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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. 276

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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State Farm Mutual Automobile Insurance Company petitions for a writ of certiorari to review a judgment of the Court of Appeals for the Seventh Circuit entered April 30, 1969 which enforced an order of the respondent National Labor Relations Board.

Opinions of the Board and Court Below

A panel of the court below first decided this case on August 8, 1968 against the Board, denying its petition for enforcement. The majority and minority opinions of the panel, not yet reported, appear at pages 1a and 15a of the appendix. On rehearing *in banc*, the court on March 26, 1969 reached the opposite conclusion by a vote of six

to two. The opinions of the court *in banc,* also not yet reported, appear at pages 20a and 29a of the appendix.

The decision and direction of elections of the National Labor Relations Board in the underlying representation proceeding are reported at 158 N.L.R.B. 925 and appear at page 39a of the appendix. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding are reported at 163 N.L.R.B. No. 94 and appear at page 51a of the appendix.

The decision and direction of election of the Board's Regional Director in a companion case, not reported, appear at page 63a of the appendix; the decision and order of the Board in that case are reported at 169 N.L.R.B. No. 122 and appear at page 70a of the appendix.

Jurisdiction

The judgment of the Court of Appeals was entered April 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

The questions presented are:

1. The proper standard to be applied by Courts of Appeals in the review of a determination by the National Labor Relations Board as to the appropriateness of a collective bargaining unit; and whether and to what extent the Board, in making such a determination, is required to give weight to the manner in which and the supervisory level at which the subjects of collective bargaining have been and will be administered by the employer.

2. Whether unit determinations of the National Labor Relations Board which will result in representation by different and competing labor unions of employees of a single employer, who work side by side and do the same

work, are in conflict with the policy of §9(b) of the National Labor Relations Act and with applicable decisions of this Court.

Statute Involved

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 36, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), appear at page 81a of the appendix.

Statement

A. Board Proceedings

1. First Representation Case

On September 27, 1965, Insurance Workers International union, AFL-CIO ("the Union") requested certification as the bargaining representative of petitioner's claim representatives* working out of local offices in the five boroughs of New York City and the neighboring counties of Westchester, Nassau and Suffolk. These offices were some of those under the direction and control of petitioner's New York auto division manager, who supervised all claim representatives in the State of New York (App. 41a-42a).**

The Union's claim was that each local office constituted an appropriate bargaining unit and that several could be grouped for collective bargaining in a single unit encompassing the metropolitan area. Petitioner argued that the requested unit was inappropriate in view of the highly

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* The duties of a claim representative are those of an "adjuster", one who investigates and attempts to settle automobile casualty claims.

** "App." refers to the appendix to this Petition. "J.A." refers to the Joint Appendix below.

centralized nature of its operations and the fact that its labor relations policy was formulated and administered at higher levels (App. 40a, 47a-48a).

The Board found that petitioner conducts a highly centralized business with all operating policies determined at its home office in Bloomington, Illinois. All personnel policies are similarly determined at the home office and are uniformly applied to all employees. For administrative purposes, petitioner is divided into twenty-one regions of the United States and Canada. The Northeastern Region, with jurisdiction over New York, New Jersey, and the New England States, is headquartered in Wayne, New Jersey, under the direction of a regional vice president (App. 41a).

Under the regional vice president who, the Board found, has final decision-making authority as to personnel matters within the region, were two auto operating divisions, one life operating division and one sales division (App. 41a, 44a). The auto division manager for the State of New York supervised the work of the claim representatives involved in this case. He was the lowest ranking official with power to make effective recommendations on personnel matters affecting claim representatives (J.A. 51-53, 62-63).

Below the auto division manager were divisional superintendents, whose number fluctuates with the volume of business in the division (J.A. 44-45). Under the direction of the auto division manager, divisional superintendents supervise instruction of claims personnel, review files, train claim superintendents, and may settle claims for amounts greater than may the claim superintendents or claim representatives (App. 43a). The divisional superintendents in this case are based at the regional office in New Jersey and visit the offices under their supervision about once every two weeks (App. 43a).

The lowest level supervisor is the claim superintendent who trains claims representatives in the handling of claim matters, reviews files and may settle claims in amounts greater than may the claim representatives (J.A. 54-56). Most claim superintendents are based at the regional office, but some are located at the local offices with the claim representatives (J.A. 82, 182).

In personnel matters, the degree of involvement of the divisional superintendents and claim superintendents was equal; neither had any authority to make effective recommendations concerning such matters (J.A. 51-53, 62-63).

On these facts the Board concluded that the unit requested by the Union was inappropriate, but that any one of three units would be appropriate. Thus a unit consisting of the claim representatives supervised by the regional vice president would be appropriate, and so would such a unit supervised by an auto division manager, or by a divisional superintendent (App. 46a-47a). Among these three units, the Board chose the smallest, i.e., the one supervised by the divisional superintendent.

The Board had earlier developed a special rule for determining bargaining units in life insurance agent cases (e.g. *Quaker City Life Insurance Co.*, 134 N.L.R.B. 960 [1961]). In reaching its conclusion in the instant case, the Board felt itself impelled to follow those life insurance agent cases, notwithstanding its express holding that (App. 45a-46a).

> "The evidence of record in the case before us presents a significantly different picture of field operating procedure from that developed in [*Quaker City Life Insurance Co.*, 134 N.L.R.B. 960 (1961) and *Metropolitan Life Insurance Co.* (*Woonsocket, R.I.*) 156 N.L.R.B. 1408 (1966)]."

Apart from the fact that petitioner concededly does an insurance business, there was no basis in the record for applying to these bargaining units any standard other than the one applicable to employers generally.

The Board's unit determination resulted in a direction that two elections be held, one each among the claim representatives working out of local offices then under the supervision of two of the Company's divisional superintendents (App. 49a). The Union won the election in one of the units, and lost it in the other.

2. The First Unfair Labor Practice Case

Petitioner refused to bargain with the Union in order to obtain judicial review of the Board's unit determination. After issuance of a complaint and answer by the Company, the General Counsel of the Board moved for summary judgment. Petitioner opposed the motion, but it was granted and petitioner was directed to bargain with the Union. It is this order that was first denied enforcement by a panel of the Seventh Circuit, and then enforced by the court *in banc*.

3. The Second Representation Case

As indicated, of the two units established by the Board in the first representation case, the Union won the election in only one. On May 12, 1967, a second union, American Communications Association ("ACA"), affiliated with the Teamsters, requested the Board to certify it as the bargaining representative of the unit in which the Union had lost the election. Petitioner again opposed the certification of the unit sought, pointing out the expected changes in petitioner's organizational structure brought about by the growth of its business and the result, if the Board's first unit determinations were adhered to, that employees doing the same work in the same local office

would fall into different bargaining units and could be represented by competing unions.

The Regional Director, considering himself bound by the Board's first unit determination, certified the unit sought by ACA (App. 63a). The Board declined to review the Regional Director's decision, and ACA won the ensuing election and was certified.

4. The Second Unfair Labor Practice Case

The instant case was already pending in the court below when petitioner was requested to bargain with ACA. Consistently with its position in this case, petitioner refused to bargain, and a Board complaint issued.

When the General Counsel moved for summary judgment, petitioner opposed, specifically pointing out that what had earlier been feared had now eventuated: there were now two units represented by competing unions, and, in some instances, employees doing the same work and working side by side in the same office were, under the Board's decisions, in fact going to be represented by different unions.

Petitioner sought review of the Board's second order in *State Farm Mutual Automobile Insurance Company* v. *National Labor Relations Board*, No. 16809, Seventh Circuit. That case was argued on May 19, 1969 and has not yet been decided.

5. The Nature of the Units Certified by the Board

In the life insurance cases treated by the Board as a model for its determinations in this case, the unit was always determined by reference to a local district office, supervised by a district office manager. Definition of the unit by geographical reference to the location of the office served also to identify the manager who supervised the

agents in that office. In the case at bar, the claim representatives serve a function entirely different from that of life insurance agents, and the company's organization bears no resemblance to that of the life insurance companies.

The reasons articulated by the Board for its determination in this case fixed upon the divisional superintendents as "a supervisory focal point" who "appear to exercise powers most closely analogous to those possessed by the district office managers in the earlier cases" (App. 46a). But the actual unit determination (App. 48a) made no reference to the divisional superintendent, and defined the unit in geographical terms: "claim representatives . . . assigned to" specified local offices in New York.

The divisional superintendents, however, worked out of the regional office in New Jersey, not in the local offices, and were not permanently assigned to the supervision of entire local district offices. It was therefore apparent that, as petitioner's business grew and more divisional superintendents were added, some claim representatives in a single local office might come under the supervision of one divisional superintendent while others in the same office would fall under the jurisdiction of another (J.A. 199-201).

What appeared to be inevitable when this case came before the Board, became a fact by the time the companion case was decided. Now, if the Board's determinations are permitted to stand, the claim representatives working side by side in a single local office and doing the same work will be represented by different and competing unions.

B. Panel and *In Banc* Opinions

In the lower court's first decision of this case, a majority of a panel found no evidence that the unit supervised by

a divisional superintendent is autonomous. Relying on the Seventh Circuit's own decision in *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (1966), and on *NLRB* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (1st Cir. 1967),* the majority concluded also that the divisional superintendents "possessed no significant managerial authority" (App. 14a).

> "It is for the reviewing court to decide whether the Board's determination is supported by substantial evidence, whether its discretion was reasonably exercised and whether it disclosed a proper basis for its order. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 443.
>
> "We have read and reread the Board's decision in the representation proceeding, its findings and conclusions, together with its brief filed in this court, and reach the definite conclusion that its determination of the unit in controversy is not supported by substantial evidence and is clearly erroneous." (App. 5a)

On rehearing *in banc*, the majority found "of particular significance" the "fact that the next largest unit available under the Company's organizational structure covers a multi-state area" (App. 24a). This, said the majority, would frustrate the Board's preference for "less than state-wide unit[s]" in insurance agent cases** (App. 25a).

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* In which certiorari had been denied, 389 U. S. 959 (1967).

** In fact, petitioner argued below for a unit supervised by an auto division manager who, at the time the record was made, had, but no longer has, state-wide authority. The argument was based on his managerial functions and not on geography. Even while this case was being heard by the Board, petitioner had auto division managers in other parts of the nation whose geographical jurisdiction extended only to a part of a state and, in several instances, only to a metropolitan area.

Finally, the authority of a district office manager, according to the majority, "does not significantly differ from the authority of the divisional claims superintendent in the case before us . . ." (App. 25a). In this respect, the *in banc* majority came to a conclusion exactly contrary to the finding of the Board that this case "presents a significantly different picture" (*supra*, p. 5), and relied heavily on that conclusion to affirm the Board's unit determination.

Reasons for Granting the Writ

This case presents a fundamental question concerning the standards to be applied by Courts of Appeals under the National Labor Relations Act when they are called upon to review unit determinations. While unit determinations are a major part of the Board's business,* this case and five other recent decisions of Courts of Appeals (which we discuss, *infra*) have served to leave in confusion the standards by which they are to be reviewed.

The conflict between panel and *banc* in the case at bar is itself evidence of this confusion. While both cited and purported to follow *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965) (App. 5a, 23a), both reached opposite conclusions on the same record.

Certiorari should be granted because the Act cannot be evenhandedly administered without a clarification by this Court of this important question.

Certiorari should be granted also because the decision below has resulted in bargaining units having no relevance to the collective bargaining process, and are therefore inconsistent with the language and purpose of Sec-

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* National Labor Relations Board Thirty-Second Annual Report, pp. 215, 228-29, 231 (1968).

tion 9(b) of the Act and with an applicable decision of this Court.

1. Section 9(b) of the Act empowers the Board to decide "in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Although the Board is granted wide discretion in determining the appropriate bargaining unit, §10(e) of the Act requires the Courts of Appeals to accept the Board's findings of fact only "if supported by substantial evidence on the record considered as a whole . . ."

In *Universal Camera Corp.* v. *NLRB,* 340 U. S. 474 (1951), this Court, after noting the difficulties inherent in the substantial evidence test, held that to satisfy the Congressional mandate that Board decisions be reasonable and fair, the Courts of Appeals must not subjugate their judicial function to the administrative function performed by the Board.

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function . . . . The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Id.* at 490

Although the issue of substantiality of evidence is primarily for the Courts of Appeals, this Court has assumed the obligation to intervene in "the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Id.* at 491; *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404, 408 (1962).

Such a "rare instance" has now occurred for, while the court below acknowledged that an "arbitrary or unreasonable" determination of the Board must be overturned (App. 23a), it grossly misapplied that standard when it ignored the fact that the Board had failed to give any weight to petitioner's administrative structure and to the supervisory level in petitioner's organization at which labor relations decisions are made.

As the panel decision of the court below correctly pointed out, this failure on the Board's part deprived its determination of any substantial support in the evidence and therefore of any "proper basis for its order" (App. 5a). Other recent decisions of Courts of Appeals serve to illustrate the confusion engendered by the decision *in banc* below.

In *NLRB* v. *Frisch's Big Boy Ill-Mar, Inc.*, 356 F. 2d 895 (7th Cir. 1966), decided by the same Circuit as was the case at bar, the Board found appropriate a unit consisting of the employees in a single restaurant which was one of the chain of ten located in Indianapolis. The decision was based on a finding of "autonomy" in each restaurant. The court denied enforcement because the undisputed facts showed that a common labor policy affecting all employees was formulated for the entire chain by the chief executive of the company. Neither the store manager nor the area supervisor, each of whom had jurisdiction over several stores, was vested with "any significant element of judgment as to employment relations"

or would "be deciding questions affecting the employees in the context of collective bargaining" (*Id.* at 897).

In *NLRB* v. *Purity Food Stores, Inc.*, 376 F. 2d 497 (1st Cir.), *cert. denied*, 389 U. S. 959 (1967), the Board found appropriate a unit consisting of the employees of a single supermarket—one of a chain of seven located within a radius of thirty miles from Chelmsford, Massachusetts. The Board decision had been based on the "significant autonomy" of the single store, notwithstanding highly centralized administration and frequent employee transfers from store to store. The court denied enforcement because "only friction between employees and chaos in labor relations could possibly result if some employees were under union rules as to wages, hours, seniority, grievance procedures, etc. when the employees working beside them in the same category were not. The Board's conclusion to the contrary flies in the face of reality" (*Id.* at 501).

While conceding the Board's broad discretion in unit determination cases, the court in *Purity* found that the Board had failed to offer for its unit determination the substantial reasons required by this Court in *Metropolitan Life.*

In *NLRB* v. *Davis Cafeteria, Inc.*, 396 F. 2d 18 (5th Cir. 1968), the court followed *Frisch's* and *Purity* to set aside a unit consisting of two cafeterias, when under the Company's form of organization, eight such cafeterias constituted a single administrative district. The Board had found that a central office determined labor policy, but that each cafeteria manager had sufficient autonomy to render each cafeteria an appropriate unit. The court refused to enforce because the entire record revealed that the factors on which the Board had relied did "not constitute any sort of local managerial authority over substantive subjects of collective bargaining" (*Id.* at 20). There-

fore, said the court, the Board had abused its discretion and its decision was not supported by substantial evidence.

In *NLRB* v. *Solis Theatre Corp.*, 403 F. 2d 381 (2d Cir. 1968), it was held "of marked significance that [the owner of a 'circuit' of fifteen motion picture theatres] sets a single labor policy for the entire circuit, which has resulted in similar wages, hours and working conditions for all of its employees" (*Id.* at 383). While the Board had based its single-theatre unit determination on the role of the manager of the theatre, the record revealed that he had "little or no authority on labor policy but is subject to detailed instructions from the central office" (*Id.* at 383). Consideration of the record as a whole therefore brought the court to the conclusion "that the facts on which the decision of the Board is based are not supported by substantial evidence. The Board's action must under the circumstances be held to be arbitrary and unreasonable . . ." (*Id.* at 382).

An opposite result was reached by the same Circuit in *Continental Insurance Co.* v. *NLRB*, — F. 2d —, 70 LRRM 3046 (2d Cir. 1969), which involved a casualty insurance company with branch claims offices each under the supervision of a branch claims manager. The Board held each branch claims office appropriate as a bargaining unit. In that case, as in the case at bar and as in all the Court of Appeals decisions discussed above, final decisions concerning labor relations matters were made at higher levels of the company. The court concluded that the Board did have the power to "fractionate a multi-unit operation whose labor policy is centrally directed and administered" (Slip Op. p. 1907).

The opinion *in banc* in the instant case took no cognizance of *Davis* or *Solis* and mentioned *Frisch's* and *Purity* only to say that neither "is controlling or persuasive on

the facts here" (App. 26a). The Second Circuit, in *Continental Insurance*, tackled the problem more forthrightly but its tortuous effort to distinguish the four cases provides an eloquent statement of the reason why certiorari should be granted here.

The question presented by these cases for resolution by this Court is whether the Board acts arbitrarily and unreasonably when, in articulating the reasons for its unit determinations, it fails to give due weight to the administrative organization of the employer and to the manner in which, under that organization, questions affecting labor relations and collective bargaining are to be decided. The Board, by its decisions, has indicated an unwillingness to abide by any adverse decision in this field; for example, in the court below, the Board's brief suggested that the decision in *Frisch's* was an "aberrational abuse of judicial power" (App. 36a).

It is fair to expect therefore, that, until the question is settled by this Court, the Board will treat decisions of the Courts of Appeals on this question as interlocutory and not binding on it. Employers and unions, at the same time, find it impossible to determine with any degree of certainty whether employers are required by law to bargain with representatives of units established under these conditions, and employers are encouraged by the confusion to seek judicial review in every doubtful case.

Only the granting of certiorari in a case such as this can serve to dispel this confusion.

2. Section 9(b) of the Act charges the Board with the responsibility for establishing units "for the purposes of collective bargaining" and within which the process of collective bargaining must function. It was early decided in *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 165 (1941) that "[a]s a standard" for determining a collective

bargaining unit, the Board must comply "with the requirement that the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining."

That policy has been frustrated by the decision below, not only because of the lack of managerial authority over the subjects of collective bargaining at the level chosen by the Board as a "supervisory focal point," but also because the two units found appropriate will include employees doing the same work side by side and represented by different and competing unions.

Courts of Appeals have also required the Board to adhere to the standard of "efficient collective bargaining," and have refused enforcement of bargaining orders whenever the record has indicated a failure to establish units which recognize the realities and pressures of the collective bargaining process. E.g., *NLRB* v. *Harry T. Campbell Son's Corp.*, —— F. 2d ——, 59 L.C. §13,306 (4th Cir. 1969); *Rayonier, Inc.* v. *NLRB*, 380 F. 2d 187, 194-195 (5th Cir. 1967); *NLRB* v. *Purity Food Stores, Inc.*, 354 F. 2d 926, 931 (1st Cir. 1965); *NLRB* v. *Convair Pomona*, 286 F. 2d 691, 696 (9th Cir. 1961).

In this case those realities included the facts: (1) that each divisional superintendent sits in New Jersey and supervises, but has no significant authority over the wages, hours or other working conditions of a group of employees located in New York; and (2) that normal and predictable growth in petitioner's business led inevitably to an increase in the number of divisional superintendents and to reshuffling of the employees among the groups supervised.

Certiorari should therefore be granted for the additional reason that the judgment below decides a federal question in a way in conflict with the policy of the Act and with an applicable decision of this Court.

CONCLUSION

For the reasons given, the writ of certiorari should be granted.

Respectfully submitted,

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